83-2090

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRITZ BUFORD MAYFIELD, doing business as JOE'S CAFE and BUFORD'S LAKEVIEW MOTEL and RESTAURANT,
Petitioner,

vs.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE DENYING APPELLANT, MAYFIELD'S, MOTION TO SET ASIDE ENTRY OF DEFAULT AND GRANTING APPELLEE, DONOVAN'S, MOTION FOR DEFAULT JUDGMENT.

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REPORTS

The opinion of the United States District Court for the Western District of Tennessee was delivered in case number 82-1071, and is not reported.

The decision of the United States Court of Appeals for the Sixth Circuit was delivered in case number 82-5644 and was not recommended for full-text publication.

GROUNDS FOR INVOCATION OF THE JURISDICTION OF THIS COURT

The United States District Court for the Western District of Tennessee, the Honorable Robert McRae, Judge, entered the default judgment from which appellant, Mayfield, seeks relief on October 14, 1982, at approximately 8:30 a.m. in the case of *Donovan v. Mayfield,* Civil Action File No. 82-1071.

The United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Western District of Tennessee by Order dated February 29, 1984, which Order was issued as a Mandate on March 22, 1984, in Case No. 82-5644.

The appellant did not request rehearing nor did appellant seek an extension of time in which to petition for certiorari.

The statutory provision believed to confer on this Honorable Court jurisdiction to review the judgment of the United States District Court for the Western District of Tennessee, affirmed by the United States Court of Appeals for the Sixth Circuit is 28 U.S.C. 1254.

ARGUABLE STATUTES AND COURT RULES

Federal Rule of Civil Procedure 55(c): Setting Aside Default— For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Federal Rule of Civil Procedure 60(b): Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc. — On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertance, surprise, or excusable neglect; (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3)

Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) The judgment is void; (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) Any other reason justifying relief from the operation of the judgment. The Motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. 1655, or to set aside a judgment for fraud upon the court. Writs of Coram Nobis, Coram Vobis, Audita Querala, and Bills of Review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. Procedural History: On March 26, 1982, appellee, Donovan, filed his complaint in the United States District Court for the Western District of Tennessee, Eastern Division. Said complaint alleged cause of action arising under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. Section 201, et seq.) (hereinafter referred to as "the Act"). Appellant, Mayfield, was served on April 7, 1982.

On June 22, 1982, appellee, Donovan, filed application to the court clerk for entry of default together with affidavit relative thereto. On this same day the clerk of court made an entry of default.

On June 24, 1982, appellant, Mayfield, filed a response to appellee, Donovan's, application for entry of default and counsel for appellant, Mayfield, filed an accompanying affidavit.

On July 13, 1982, appellee, Donovan, filed a response to appellant, Mayfield's, response to the application for entry of default. Thereafter, on July 26, 1982, appellee, Donovan, filed a motion for judgment by default.

On August 13, 1982, the court entered an order setting a hearing for August 27, 1982, for appellant, Mayfield, to show cause why default judgment should not be entered.

On August 27, 1982, appellant, Mayfield, filed, under Fed. R. Civ. P. 55 (c), a motion to set aside the entry of default with accompanying affidavit, a proposed answer, together with supporting documentation, and requested the trial court to grant him a trial on the merits. At said hearing, the court overruled appellant, Mayfield's, motion to set aside the entry of default on the grounds that said motion was not timely filed, and refused to consider the motion on its merits. (Tr. p. 6, 7).

The court then proceeded to hold a hearing upon appellee's motion for default judgment, and on September 24, 1982, Findings of Fact and Conclusions of Law were entered upon the trial court's signature together with the proposed default judgment order. On October 14, 1982, the order of default judgment was entered. Said default judgment provided mandatory injunctive relief and ordered the appellant, Mayfield, to pay the appellee the sum of Seventy-Six Thousand Eight Hundred Forty-Seven and 91/100 ($76,847.91) dollars; said default judgment became final ten (10) days thereafter subject to Fed. R. Civ. P. 60(b) relief or stay of execution under Fed. R. Civ. P. 62.

On October 22, 1982, appellant, Mayfield, filed notice of appeal to the United States Court of Appeals for the Sixth Circuit.

On November 29, 1982, pending appeal of this cause to the United States Court of Appeals for the Sixth Circuit, appellee's counsel filed petition for adjudication in civil contempt seeking immediate payment of the monetary judgment and/or appellant, Mayfield's, immediate incarceration plus payment of a compensatory fine and additional costs.

On December 7, 1982, appellant, Mayfield, filed a response to civil contempt petition together with motion to set aside default judgment, and alternatively, to stay proceedings pending appeal under Fed. R. Civ. P. 60(b) and Fed. R. Civ. P. 62 (c) and (d).

On December 8, 1982, appellee, Donovan, filed response to appellant, Mayfield's, response and further responded to appellant, Mayfield's, motions mentioned hereinbefore opposing all relief sought therein except an order staying the proceedings to enforce the default judgment.

On June 6, 1983, the court entered an order staying proceedings pending appeal, providing that appellant, Mayfield, secure and post an appropriate supersedeas bond within twenty (20) days.

On June 16, 1983, appellant, Mayfield, filed a document entitled notice of appeal to a court of appeals from a judgment or order of a district court appealing the trial court's order staying proceedings pending appeal entered June 6, 1983. The Sixth Circuit Court of Appeals opened a separate legal file for this matter.

On June 28, 1983, in the original appeal (case #82-5644) the Sixth Circuit Court of Appeals entered an order denying appellant, Mayfield's, motion for stay on the grounds that he had not met his burden of objectively demonstrating why the court should depart from the requirement of a full security supersedeas bond.

On February 29, 1984, the Sixth Circuit Court of Appeals filed an order in this cause (#82-5644) affirming the judgment and proceedings in the district court, and mandate issued March 21, 1984.

On or about March 28, 1984, appellee, Donovan, filed in the trial court a second petition for adjudication and civil contempt seeking to have appellant, Mayfield, immediately pay the full amount of the default judgment together with interest or in the alternative to post a supersedeas bond in like amount and that appellant, Mayfield, be required to pay a compensatory fine to reimburse appellee for his costs and expenses of litigation and that appellant, Mayfield, be taken into custody and held until such time as he complied with the above request. Appellant, Mayfield, filed a response to the petition for adjudication and civil contempt on April 26, 1984. A show cause hearing was held on April 27, 1984, before the trial court and said hearing has been continued until June 8, 1984, at 2:00 p.m. and said continuance is still pending at the time of the drafting of this petition.

B. **Statement of the facts:** Appellant, Fritz Buford Mayfield, at all times relevant to this action owned and operated Joe's Cafe and Pool Room, and Buford's Lakeview Motel and Restaurant in Jackson, Madison County, Tennessee. Appellant, Mayfield, no longer owns or operates the Lakeview Motel or Restaurant.

In 1981, Zedric McMillen, a compliance specialist from the wage/hour division of the Department of Labor investigated certain pay practices at Buford's Lakeview Motel and Restaurant and at Joe's Cafe and Pool Room. Mr. McMillen's investigation covering the periods from July 19, 1979, to July 18, 1981, disclosed alleged violation that Mr. Mayfield was not paying minimum wage, was not paying overtime compensation for hours worked in excess of forty (40) per week, and that Mr. Mayfield was not maintaining proper records.

After receiving service of the summons and complaint in this cause, appellant, Mayfield, attempted to secure the pertinent financial information from his local bookkeepers and his accounting firm in Arlington Heights, Illinois, but was unable to do so until August 19, 1982. The financial information sought by appellant, Mayfield, was that which would show that he did not do sufficient volume of business to come under the coverage of the act specifically set forth in Section 3(s)(2).

Appellant, Mayfield, filed on the morning of August 27, 1982, before the convening of court his motion to set aside entry of default and a proposed answer setting forth the defense that he was not covered by Section 3(s)(2) of the Act.

ARGUMENT

The United States Court of Appeals for the Sixth Circuit erred in affirming the decisions of the United States District Court for the Western District of Tennessee denying the appellant's Motion to Set Aside Entry of Default and granting appellee's Motion for Default Judgment.

Fed. R. Civ. P. 55(c) allows the trial court to set aside an entry of default upon a showing of good cause, and further points out that if *judgment by default* has been entered, it may likewise be set aside in accordance with Fed. R. Civ. P. 60(b). Thus, upon a showing of good cause, the trial court may set aside an entry of default under Fed. R. Civ. P. 55(c).

The decision as to whether the defaulting party has shown good cause sufficient to justify the setting aside of the entry of default is addressed to the sound discretion of the trial court, and, absent a showing of abuse of discretion, the trial court's decision will not be disturbed. *Keegel v. Key West and Caribbean Trading Co., Inc.,* 627 R.2d 372 (D.C. Cir. 1980); *Savarese v. Edrick Transfer and Storage, Inc.,* 573 F.2d 140 (9th Cir. 1974).

Federal policy holds in disfavor the disposition of controversies by default and favors the decision thereof on the merits. Motions to set aside entries of default should therefore be considered under a liberal standard, with doubts resolved in favor of setting aside defaults and deciding cases on the merits. *McVicker v. Donnelly,* 95 F.R.D. 353 (D.C. Pa. 1982); *Reid v. Liberty Consumer Discount Co. of Pennsylvania,* 484 F. Supp. 435 (D.C. Pa. 1980); *Davis v. Parkhill-Goodloe Company,* 302 F.2d 489, 495 (5th Cir. 1952).

There are several factors which have been almost universally applied by the various federal courts in ascertaining whether good cause for setting aside an entry of default exists. In *Rasmussen v. W.E. Hutton and Co.,* 68 F.R.D. 231, 233-234, (N.D. Ga. 1975), the court enumerated these as:

1. Whether the party in default has shown a meritorious defense;

2. How promptly the defaulting party acted;

3. Whether the default was willful or the result of excusable neglect; and

4. Will the non-defaulting party be prejudiced by the setting aside of the default.

The Court in *Rasmussen,* 68 F.R.D. at 233, pointed out that the well settled principle, set forth in Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b), that the standard used in setting aside entry of default is far more liberal than that used to justify setting aside a default judgment.

The Honorable Trial Court in this cause did not evaluate appellant, Mayfield's, Motion to Set Aside Entry of Default under the hereinabove enumerated criteria. The court clearly refused to even consider appellant, Mayfield's, Motion due to the fact that it was filed on the morning of the show cause hearing (to show cause why a default judgment should not be entered) and was therefore "not timely filed" and "come too late" (Tr. p. 6, 7). The court further noted that the judgmental hearing convinced the court that the Motion was not well taken and stated that the accompanying affidavit was insufficient to show excusable neglect (Tr. 37, 38); these observations were given after the court had previously overruled the Motion and proceeded to a judgment by default. The appellant, Mayfield, was not allowed or permitted to attempt to show good cause for setting aside entry of default as the Motion was overruled *without consideration of its merits.*

Appellant, Mayfield, would contend that the Honorable Trial Court abused its discretion in overruling the Motion to Set Aside Entry of Default by not considering the Motion on its merits and allowing appellant, Mayfield, a hearing thereon. The court, in essence, considered only the factor of the time of filing

of the Motion. Fed. R. Civ. P. 55(c) does not specify a time limit for the filing of such motion, and Fed. R. Civ. P. 60(b) allows the setting aside of a default 'judgment' up to one year after its entry.

Appellant, Mayfield, realizes that ordinarily discretionary decisions of the trial court will be given great deference, but that the instant cause is one in which the trial court clearly abused its discretion. The question of a trial court's exercise of its discretion in ascertaining whether an entry of default should be set aside was addressed in *Keegal v. Key West and Caribbean Trading Co., Inc.*, 627 F.2d 372, 373-374 (D.C. Cir. 1980):

> Though the decision lies within the discretion of the trial court, exercise of that discretion entails consideration of whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious; an abuse of discretion need not be glaring to justify reversal, modern federal procedure favoring trial on the merits.
>
> Consideration of the listed criteria is not reflected in the District Court's memorandum. Absence of record indication that proper standards were applied in refusing to set aside a default has been held sufficient in itself to warrant reversal.

Appellant, Mayfield, would show to this Honorable Court that the applicable portion of the trial court's Findings of Fact and Conclusions of Law (Paragraph 10, X) do not show any consideration of the hereinabove enumerated factors in its overruling of appellant, Mayfield's, Motion to Set Aside Entry of Default; to the contrary, the record reflects that the Trial Court refused to consider the Motion or hold a hearing thereon (Tr. pp. 6, 7). This does not conform to the preference for a liberal standard in deciding such motions nor with the decided preference for trial on the merits.

Appellant, Mayfield, would contend that the circumstances, briefly addressed here, of the instant cause, would show that the trial court should have, at the very least, given due consideration to the Motion and that had this been done, the trial court would have, in conjunction with the resolution of doubt in favor of a trial on the merits, ascertained that said Motion was well taken. The default was entered on June 22, 1982, and on June 24, 1982, counsel for appellant, Mayfield, filed a response to appellee, Donovan's, Application for Entry of Default. While counsel for appellant, Mayfield, concedes that a Fed. R. Civ. P. 6(b) Motion for Extension of Time would have been proper along with a Fed. R. Civ. P. 55(c) Motion to Set Aside Entry of Default with supporting affidavit at this time, he would contend that the response filed on June 22, 1982, would show an attempt to take action in this regard. The Motion to Set Aside Entry of Default filed at approximately 8:30 a.m. on August 27, 1982, along with the supporting affidavit and proposed Answer to appellee, Donovan's, Complaint fully meet the criteria hereinabove specified in that it shows that the failure to plead was not the result of an attempt to delay the cause but due to inability to obtain information regarding appellant, Mayfield's, business volume from accountants located out of state in Illinois, and it alleges a meritorious defense (that his business enterprise did rise out of the dignity of the jurisdictional requirements and provisions of the act). It is not necessary for the defaulting party to elaborate on the facts underlying the meritorious defense, he needs only to allege a defense which, if proven at trial, would constitute a complete defense. *Keegel v. Key West and Caribbean Trading Co., Inc.*, 627 F.2d 372, 374 (D.C. Cir. 1980); *Thorpe v. Thorpe*, 364 F.2d 692,694 (D.C. Cir. 1966); *Rasmussen v. W.E. Hutton and Co.*, 68 F.R.D. 231, 234 (N.D. Ga. 1975). Further, the setting aside of the Entry of Default would not have resulted in any prejudice to appellee, Donovan, and the appellant so alleged.

Appellant, Mayfield, would show to this Honorable Court that this is a proper cause for the issuance of a Writ of Certiorari, in that the affirmance of the decision of the United States District Court for the Western District of Tennessee overruling appellant, Mayfield's, Motion to Set Aside Entry of Default without consideration by the United States Court of Appeals for the Sixth Circuit is a departure from the policies of modern federal practice favoring the liberal approach to such motions, and the disfavor of default judgments relative to trial on the merits. This cause will provide the Honorable Court with a vehicle by which this court might establish a flexible set of criteria in which the lower courts may decide such issues as that presented here, and such would be a proper exercise of the supervisory power of this Court.

CONCLUSION

Appellant, Mayfield, would, for the reasons hereinabove set forth, pray this Honorable Court to grant his Petition for Certiorari, enter the appropriate order pursuant to Rule 23.2 of the Rules of the Supreme Court of the United States, and allow the parties to this cause to fully and completely proceed by brief and oral argument on the merits of this appeal before this Honorable Court.

Respectfully submitted,

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Attorney for Appellant, Mayfield

CERTIFICATE OF SERVICE

I, James T. Sanderson, certify that three copies of the foregoing Petition of Certiorari were served by placing same in the United States Mail with first class postage prepaid to the following parties:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Timothy Ryan, Jr.
Solicitor of Labor
U.S. Department of Labor
Washington, D. C. 20210

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Civil Action File No. 82-1071

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

vs.

FRITZ BUFORD MAYFIELD, doing business as
Joe's Cafe and Buford's Lakeview Motel and Restaurant,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON MOTION FOR JUDGMENT BY DEFAULT
(Filed September 24, 1982)

This action arose from a complaint filed by the plaintiff, Secretary of Labor, on March 26, 1982, wherein it was alleged that the defendant, Fritz Buford Mayfield, had willfully violated the minimum wage, overtime compensation, and record-keeping provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, *et seq.)*, hereinafter the Act. Plaintiff seeks an injunction against further withholding of back wages due employees and against further violations of the Act.

This cause came on for hearing by the Court on the 27th day of August 1982 in Jackson, Tennessee. The Court, having considered the Clerk's entry of default herein, the defendant's failures and refusals to timely plead or defend, testimony in open court, pleadings and supporting affidavits, and being otherwise fully advised, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Defendant Fritz Buford Mayfield at all times hereinafter mentioned owned and operated Joe's Cafe, hereinafter Joe's, and Buford's Lakeview Motel and Restaurant, hereinafter Buford's, in Jackson, Tennessee, within the jurisdiction of this Court.

2. At all times hereinafter mentioned defendant, having been engaged in related activities performed through unified operation or common control for a common business purpose; having employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials which have been moved in or produced for commerce; having one or more retail or service establishments; having annual gross volume of sales made or business done of not less than $325,000 (exclusive of excise taxes at the retail level which are separately stated); therefore constitutes an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of §§3(r) and (s) of the Act [29 U.S.C. 203 (r) and (s)].

3. In 1977 defendant was made aware of the applicability of the Act to his employees by the Wage-Hour Compliance Specialist, Zedric N. McMillen, who conducted an investigation of defendant's pay practices at Buford's. The investigation disclosed violations of the minimum wage, overtime compensation, and record-keeping provisions of the Act. Several employees were determined to be due more than $5,000 in back wages.

4. The Compliance Specialist advised defendant of his findings of violations and explained the requirements for future compliance with the Act. Defendant paid employees the full amount computed to be due.

5. In 1981 Compliance Specialist McMillen again investigated the pay practices of defendant at Buford's and at the newly acquired Joe's Cafe. The investigation covered the period from

July 19, 1979, to July 18, 1981, and disclosed further violations of the minimum wage, overtime compensation, and record-keeping provisions of the Act.

6. Compliance Specialist McMillen testified and the Court finds that during the 1981 investigation McMillen reviewed records provided by defendant and his accountants, and interviewed defendant and approximately 25 to 30 current and former employees of Buford's and Joe's. The Court further finds that the Compliance Specialist properly investigated the pay practices of defendant.

7. The record review and interviews disclosed that employees were not paid the minimum wage for all hours worked nor overtime compensation for hours worked in excess of 40 during the workweek, and that proper records were not maintained. Pursuant to the information disclosed, the Compliance Specialist computed that defendant owes $62,426.43 to employees, consisting of $13,658.79 to 35 employees of Buford's and $48,767.64 to 42 employees of Joe's.

8. Compliance Specialist McMillen testified and the Court finds that back wages were calculated for each of the 77 employees and that such calculations were based upon examinations of employee records, where available, interviews of former and current employees, when available, and interviews of the defendant. The Court further finds that the calculations and amount of back wages due each employee are accurately depicted on the individual wage calculation sheets embodied within Exhibit A.

9. Defendant offered no evidence, live testimony, nor objections to the amount of back wages or interest thereon computed to be due employees by the Wage-Hour Division.

10. Defendant's Motion to Set Aside the Entry of Default filed on the date of hearing was denied. The Court finds that the Motion was untimely and failed to show any excusable neglect for failure to answer, plead or respond within the required time.

11. Compliance Specialist McMillen testified and the Court finds that he was employed by the Wage-Hour Division for more than 26 years and retired from Government service on July 10, 1982.

Conclusions of Law

I

The Court has jurisdiction in this matter pursuant to section 17 (29 U.S.C. 217) of the Act.

II

The defendant and his employees are engaged in commerce and in the production of goods for commerce and are employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of sections 3(r) and (s) [29 U.S.C. 203(r) and (s)] of the Act. Therefore, defendant and his employees are subject to the Act.

III

The defendant violated sections 6 and 15(a)(2) of the Act [29 U.S.C. 206 and 215(a)(2)] by paying employees engaged in commerce or in the production of goods for commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined by the Act, wages at rates less than the applicable minimum hourly rate prescribed therein.

IV

The defendant violated sections 7 and 15(a)(2) of the Act [29 U.S.C. 207 and 215(a)(2)] by paying employees engaged in commerce, in the production of goods for commerce, or employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined by the Act, wage rates less than one and one-half times the regular rates at which they were employed for hours worked in excess of 40 during many weeks of their employment.

V

The defendant violated sections 11(c) and 15(a)(5) of the Act [29 U.S.C. 211(c) and 215(a)(5)] by his failure to make, keep and preserve adequate and accurate records of his employees, as prescribed by the Act and Regulations at 29 CFR 516 thereunder.

VI

The uncontradicted testimony of the Wage-Hour Compliance Specialist and the documentary evidence embodied in Appendix "A" produce sufficient proof to show that employees were not properly paid and that back wages are due them as a matter of just and reasonable inference. The defendant has failed to come forward with any evidence to negate the reasonableness of the inference drawn from plaintiff's evidence. *Anderson v. Mt. Clements Pottery Co.*, 38 U. S. 680 (1945); *Hodgson v. Elm Hill Meats of Kentucky*, 463 F. 2d 1186 (6th Cir. 1977); *Wirtz v. Lieb*, 366 F. 2d 412 (10th Cir. 1966); *Hodgson v. Brookhaven General Hospital*, 436 F. 2d 719 (5th Cir. 1970); and *Brennan v. General Motors Acceptance Corporation*, 482 F. 2d 825 (5th Cir. 1973).

VII

The defendant has been aware of the applicability of the Act and his obligations thereunder at least since 1977. His continued violations of the monetary and recordkeeping provisions of the Act are willful and require application of the three-year statute of limitations [29 U.S.C. 255(a)]; *Brennan v. Air Terminal Parking of Columbia, Inc.*, 72 Lab. Cas. ¶32,979 (D. S.C. 1973) *aff'd* 498 F. 2d 1397 (4th Cir. 1974); *Coleman v. Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (5th Cir. 1952); *Brennan v. J. M. Fields*, 488 F. 2d 443 (5th Cir. 1973), *cert. den.*, 419 U. S. 881, 95 S. Ct. 146 (1974); *Brennan v. Heard*, 491 F. 2d 1 (5th Cir. 1974).

VIII

The question of whether an injunction should be granted is addressed to the sound discretion of the trial court. *Wirtz v. Atlas Roofing Manufacturing Company,* 377 F. 2d 112 (5th Cir. 1967); *Wirtz v. Flame Coal Company,* 321 F. 2d 558 (6th Cir. 1963). See also *Hodgson v. Square D. Co.,* 459 F. 2d 805 (6th Cir. 1972), holding that Square D Company had violated the equal pay provision and should be enjoined from further violations; *Brennan v. Linscott,* 23 Wage and Hour Cas. 176 (6th Cir. No. 76-1151, March 3, 1977), CCH 81 Lab. Cas. ¶33,511, an unpublished order affirming 22 Wage and Hour Case. 571 (S.D. Ohio 1975). Further, in the case of *Wirtz v. Carolina Co., Inc.,* 53 Lab. Cas. ¶31,806 (M.D. N.C. 1966) at page 42,773, the Court soundly reasoned: "The public interest requires employers that have violated the Act over a period of time to be enjoined against repeating such violations in the future, whether the violations have lessened or even ceased."

In *Flame Coal,* the Court of Appeals for the Sixth Circuit pointed out:

> The issuance of an injunction under the Fair Labor Standards Act is addressed to the reasonable discretion of the trial judge. (Citation omitted) The denial of the injunctive relief may, however, transcend the limits of 'reasonable discretion.' Where there has been a clear violation of the statutes and regulations...there should be assurance that the offending party will in the future voluntarily comply with the Act. Otherwise, injunction should be issued, and the trial judge's refusal to do so may constitute abuse of discretion.

Wirtz v. Flame Coal Co., supra at 560. There have been no such assurances in this case. In fact, the defendant continued to violate the Act even after having been specifically advised of the requirements for compliance. Further, once a determination has been made that back wages are owing, the trial court is without discretion to deny an injunction restraining withholding

of back wages. Such an order "is not to collect a debt owed by an employer to his employee. ... [I]t is simply a part of a reasonable and effective means which Congress, after trial and error, found it necessary to adopt to bring about a general compliance with [the statute]." *Wirtz v. Jones,* 340 F. 2d 901, 904 (5th Cir. 1965); see also *Wirtz v. Harper Buffing Machine,* 280 F. Supp. 367, 381 (D. Conn. 1968), *aff'd as modified,* 18 Wage and Hour Cas. 894 (2nd Cir. 1968) (not otherwise reported); *Wirtz v. Wershow Co.,* 416 F. 2d 1071 (9th Cir. 1969).

IX.

As at both law and equity, interest is allowed on back wages due under the Fair Labor Standards Act; payment of such back wages shall be with interest at the rate of 12% per annum. *Miller v. Robertson,* 266 U.S. 243, 256-258 (1924); *Hodgson v. American Can Co., - Dixie Products,* 424 F. 2d 356 (1970); *Shultz v. Wheaton Glass Co.,* 421 F. 2d 259 (1970), *cert. den.,* 398 U. S. 905 (1970); *Hodgson v. Daisy Mfg. Co.,* 445 F. 2d 823, at 824, 825 (1971).

X.

The defendant failed to answer, plead, or respond to the complaint within the time required by law. Moreover, he failed to timely respond to the entry of default or to show excusable neglect for his failures. Defendant's lack of diligence and failure to show any adequate legal excuse for his neglect demonstrate that there is no good cause to set aside the entry of default. *Gray v. John Jovino Co., Inc.,* 84 F.R.D. 46 (D.C. Tenn. 1979); *Hughes v. Holland,* 320 F. 2d 782 (D.C. Cir. 1963); *Robinson v. Bantam Books, Inc.,* 49 F.R.D. 139 (D.C. N.Y. 1970). Accordingly, it is

ORDERED that judgment by default shall be entered for the plaintiff with costs to be taxed against the defendant.

This 20th day of September, 1982.

/s/ Robert M. McRae, Jr.
United States District Judge

EDITOR'S NOTE

PAGES A-8 thru A-18 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

...T LABOR
...LOYMENT STANDARDS ADM... TION
WAGE AND ... DIVI...
Room 610 - 1720 West End Building
Nashville, Tn 37203

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY

Page 1

COMPLIANCE OFFICER
Zedric H. McMillon

DATE
8-3-81

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See code below)*	5. GROSS AMOUNTS DUE
Diane Anthony	Unknown	4-28-80	6-16-80	1	106.27
Cecilia Bosinger	Unknown	12-8-80	1-19-81	1	116.67
Dorothy Cadotte	Unknown	4-7-80	4-28-80	1	185.53
Aileen Beard Crouce	(Formerly) Lakeview Motel, Jackson, Tn	1-1-80	2-16-81	1	762.31
Faye Davis	Unknown	1-1-80	6-16-80	1	396.97
Bill Ervin	Hwy 45 South, Jackson, Tn Apt #23, Lakeview Motel,	4-7-80	8-4-80	1	549.07
Linda Fullington	Hwy #45 South, Jackson, Tn Apt #21, Lakeview Motel	5-26-80	7-20-81	1	885.35
Stacy Fullington	Hwy #45 South, Jackson, Tn Apt #10, Lakeview Motel	4-7-80	7-20-81	1	938.90
Ruby Graham	173 Hurt St, Jackson, Tn	1-5-80	1-26-80	1	48.70
Margaret Hawley	135 Hollywood Dr, " "	11-3-80	7-20-81	1	1164.16
Mary L. Hinson	Unknown	6-29-80	4-12-81	1	725.31
Jerry Hinton	Hwy #45 South, Jackson, Tn Apt #15, Lakeview Motel	6-21-81	7-20-81	1	139.23
Patricia Humphries	Unknown	1-5-80	3-8-80	1	147.89
Elver Johansson	Unknown	2-23-81	3-23-81	1	78.20
Dorothy Johnson	Hwy #45 South, Jackson, Tn Apt #9, Lakeview Motel	2-16-81	5-11-81	1	169.83
Rowe Johnson	Unknown	9-1-80	3-16-81	1	681.76
Bessie Jones	Hwy #45 South, Jackson, Tn Apt #37, Lakeview Motel	4-7-80	12-29-80	1	2687.05
Willie Lewis	Unknown	11-3-80	12-15-80	1	303.07
Ruby Mae Mays	(Formerly) Lakeview Motel, Jackson, Tn	4-7-80	11-10-80	1	898.88
Darla Miller	Unknown	7-28-80	8-25-80	1	76.16
			TOTAL		Forward

Name and address of establishment

Buford's Lakeview Motel & Restaurant
1311 South Highland Ave
Jackson, Tn 38301

*Column 4-Code
FLSA 1
ECA 2
SCA 3
EPA 4
CMHSSA 5
AFSA 6
CCPA 7

Appendix A

See Reverse Side for instructions

Form WH-56
(Rev. June 1978)

EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 610 - 1720 West End Building
Nashville, Tn 37203

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY

Page 2

COMPLIANCE OFFICER: Cedric H. McMillen
DATE: 6-3-81

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See code below)*	5. GROSS AMOUNTS DUE
Ruth H. Hayo	Highway #45 South, Jackson, Tn Apt #12, American Motor Inn	8-11-80	3-23-81	1	886.00
Juanita Mullinikc	95 Holly St, Bemis, Tn	1-1-80	7-20-81	1	1084.02
Patricia Neal	Unknown	12-1-80	1-3-81	1	93.87
Jeannine Nolan	Unknown	1-11-81	2-9-81	1	75.69
Vickie Perona	Unknown	2-23-81	6-15-81	1	305.65
Darlene Preculey	Unknown	4-7-80	7-13-81	1	572.33
Joe Presybycs	Unknown	4-21-80	3-9-81	1	418.93
Shirley Raley	Unknown	5-5-80	10-13-80	1	74.41
Mike Stebbins	Highway #45 South, Jackson, Tn Apt #16, Lakeview Motel	7-12-81	7-20-81	1	59.04
Diane Wade	Unknown	1-1-80	11-3-80	1	307.30
Joe Weir	(Formerly) Hwy #45 South, Jackson, Tn Lakeview Motel, Jackson, Tn	7-28-80	2-23-81	1	577.60
Betty Whitaker	Hwy #45 South, Jackson, Tn Apt #29, Lakeview Motel	8-25-80	11-17-80	1	168.09
Marty Whitaker	Unknown	1-5-81	5-25-81	1	913.50
Donna Wilson	Hwy #45 South, Jackson, Tn Apt #10, Lakeview Motel	4-20-81	7-20-81	1	126.66
Mary Sue Wray	Unknown	4-28-80	6-16-80	1	138.15

TOTAL $16,863.55

Name and address of establishment

Buford's Lakeview Motel & Restaurant
1311 South Highland Ave
Jackson, Tn 38301

*Column 4 Code
FLSA 1
EPA 2
SCA 3
CDBA 4
CWHSSA 5
ACHA 6
CCPA 7

See Reverse Side for Instructions

Form WH-56
(Rev. June 1978)

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 610 - 1720 West End Bldg
Nashville, Tn 37203

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY _____

CONFERENCE OFFICER: Zedric H. McClillch
DATE: 8-5-81

Page 1

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See code below)*	5. GROSS AMOUNTS DUE
Jimmy Arnold	131 Lenoir St, Jackson, Tn	4-12-80	3-2-81	1	2687.42
Judy Benson	Unknown	2-9-81	3-2-81	1	365.31
Rick Benson	Unknown	2-9-81	3-2-81	1	354.35
Jonor Bray	707 East Lafayette St, Jackson, Tn	1-5-80	7-18-81	1	2091.00
Lonnie Carroll	Rt #1, Box 771, Denmark, Tn	1-5-80	3-23-81	1	8039.34
Susan Darlene Crews	Unknown	1-5-80	1-12-80	1	140.22
Gilbert Davis	575 South Royal St, Jackson, Tn	3-15-80	9-29-80	1	1005.42
John T. Dennis	65 Carrol Ann Drive, "	4-20-81	6-15-81	1	817.39
Dell Ehrett	Unknown	1-5-80	3-22-80	1	1400.72
Bill Ervin	Hwy #45 South, Jackson, Tn Apt #23, Lakeview Motel	1-5-80	7-18-81	1	2726.41
Frances Ervin	Jackson, Tn Room 103, Downtowner Motel	1-5-80	7-18-81	1	3729.11
Ruby Graham	173 Hurt St, Jackson, Tn	4-28-81	7-18-81	1	658.29
Judy Heilman	Unknown	9-28-80	12-22-80	1	850.72
Mary Hinson	Unknown	6-15-81	6-30-81	1	108.48
Joe Holland	Unknown	11-3-80	12-15-80	1	747.16
Talford E. Hunt	Unknown	4-26-80	6-28-80	1	1167.27
Doris Johnson	Unknown	11-3-80	11-25-80	1	232.47
Marlene Keith	Unknown	3-15-80	6-28-80	1	1121.74
J. D. Keen	Unknown	1-5-81	1-26-81	1	310.69
Willie Lewis	Unknown	9-15-80	2-16-81	1	1364.99
			TOTAL		Forward

Name and address of establishment

Joe's Cafe
100 North Highland Ave
Jackson, Tn 38301

*Column 4 Code
FLSA 1
ICA 2
SCA 3
DBRA 4
CWHSSA 5
ADEA 6
CCPA 7

See Reverse Side for Instructions

Form WH-56
(Rev. June 1978)

EMPLOYMENT STABILIZATION
WAGE AND HOUR DIVISION
Room 610 - 1720 West End Bldg
Nashville, Tn 37203

COMPLIANCE OFFICER
Zodrie N. McMillen
DATE
8-5-81

BY [illegible] OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY _____

Page 2

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. FCIS (See code below)*	5. GROSS AMOUNTS DUE
Kathy Martin	Unknown	1-26-80	3-8-80	1	490.77
Carvey McCroskey	Jackson, Tn Rt #1, New Bells Hwy,	1-1-80	7-18-81	1	3087.60
Sara Renee McKee	Unknown	4-5-81	5-25-81	1	50.79
Dornice Minton	Hwy #45 South, Jackson, Tn Apt #21, Lakeview Motel	6-8-81	7-18-81	1	344.15
Danny Mosier	Unknown Jackson, Tn	1-5-80	3-8-80	1	1157.27
Ruth M. Moyo	Apt #12, American Motor Inn	4-5-81	7-18-81	1	1293.34
Leslie Owens	Unknown	7-12-81	7-18-81	1	59.04
Clara Page	Unknown	3-15-80	8-30-80	1	1752.75
Harold Page	Unknown	1-26-80	3-8-80	1	576.87
Fred E. Parrish	Briarcliff Drive, Jackson, Tn	7-5-80	10-27-80	1	741.69
Joe Prysbyss	Unknown	1-5-80	4-12-81	1	2199.84
Shirley Raley	Unknown	3-15-80	4-19-80	1	420.66
Ted Russell	Jackson, Tn c/o Murphy Hotel, South Royal	St 1-5-80	10-27-80	1	3710.69
Barbara Rutledge	Unknown	3-16-81	3-20-81	1	373.40
Clifford Smith	Jackson, Tn Apt #601, New Southern Center	1-19-80	10-27-80	1	2641.79
Sadie Smith	Unknown	7-5-80	12-15-80	1	992.61
Anita Taylor	Unknown	12-1-80	12-15-80	1	112.91
Vada Louise Touton	Unknown	10-20-80	11-17-80	1	290.50
Mike Vales	Hwy #45 South, Jackson, Tn Apt #17, Lakeview Motel	9-1-80	7-18-81	1	3396.52
Jessie Warren	Union City, Tn	1-5-80	6-1-81	1	3190.62
Joe Weir	Hurt Street, Jackson, Tn	1-5-80	5-25-81	1	2675.49
Billy Williams	Unknown	2-9-81	3-8-81	1	306.76
			TOTAL		$59,984.36

Name and address of establishment

Joe's Cafe
108 North Highland Ave
Jackson, Tn 38301

*Column 4 Codes
FLSA 1
FCA 2
SCA 3
DBRA 4
CWHSSA 5
UMWA 6
CCPA 7

See Reverse Side for Instructions

Form WH-56
(Rev. June 1978)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Civil Action File No. 82-1071

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

vs.

FRITZ BUFORD MAYFIELD, Doing Business as
Joe's Cafe and Buford's Lakeview Motel and Restaurant,
Defendant.

DEFAULT JUDGMENT
(Filed October 11, 1982)

This cause having come on for hearing before the Court at Jackson, Tennessee, on the 27th day of August 1982 on plaintiff's Motion for Judgment By Default against the defendant Fritz Buford Mayfield, the plaintiff and defendant appearing by counsel, and it appearing to the Court that the complaint was duly filed and served upon defendant on March 30, 1982, that the defendant failed to answer, plead or respond within the time required by law, and default was entered by the Clerk of this Court against defendant on June 22, 1982,

NOW, THEREFORE, based upon the said motion and affidavits, testimony in open court, and the entire record herein, sufficient reason therefor appearing, it is hereby

ORDERED, ADJUDGED and DECREED that the defendant, Fritz Buford Mayfield, his agents, servants, employees, and all persons acting or claiming to act in their behalf and interest be, and they are permanently enjoined and restrained from violating the provisions of sections 6, 7, 11(c), 15(a)(2),

and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, *et seq.*), hereinafter referred to as the Act, in any of the following manners:

1. Defendant shall not, contrary to sections 6 and 15(a)(2) of the Act, pay to any of his employees who are engaged in commerce or in the production of goods for commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined by the Act, wages at rates less than the applicable minimum wage rate specified by section 6 of the Act.

2. Defendant shall not, contrary to sections 7 and 15(a)(2) of the Act, employ any employee in commerce, in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, as defined by the Act, for a workweek longer than 40 hours without compensating the said employee for his employment in excess of 40 hours in such workweek at a rate not less than one and one-half times the regular rate at which he is employed.

3. The defendant shall not, contrary to sections 11(c) and 15(a)(5) of the Act, fail to make, keep and preserve adequate and accurate records of his employees, as prescribed by said section 11(c) and Regulations 29 CFR 516 thereunder.

It is further ORDERED, ADJUDGED and DECREED that the defendant be and he hereby is enjoined from continuing to withhold compensation due under the Act to employees listed in Appendix "A" attached hereto, in the amounts stated with respect to each, and in the total amount of $76,847.91.

This provision of this judgment shall be deemed satisfied upon delivery by defendant to plaintiff's attorneys of the sum of $76,847.91, by certified or cashier's check, payable to the order of "Wage-Hour Division, Labor," within 30 days following the entry of this judgment. Plaintiff shall distribute the proceeds from said check to the persons named above, in the respective

amounts due less social security and withholding taxes, or to their estates if necessary, and any money not so distributed within a period of one year because of inability to locate the proper person or because of their refusal to accept it, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasury of the United States.

It is further ORDERED that the defendant shall not accept, either directly or indirectly, or permit any other person to accept for him, the kickback, refund, or return of any portion of the back wages herein agreed to be disbursed by the Secretary of Labor pursuant to the provisions of this judgment.

It is further ORDERED that the taxable costs shall be paid by defendant for which execution may issue if necessary.

Enter: October 14, 1982.

/s/ Robert M. McRae, Jr.
United States District Judge

...EMENT LABOR
...EMPLOYMENT STANDARDS ADM... TION
WAGE AND ...DIVI...
Room 610 - 1720 West End Building
Nashville, Tn 37203

COMPLIANCE OFFICER
Zedric H. McMillen — DATE 8-3-81

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY

Page 1

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTIVITY (See reverse Column 4 Code)*	5. GROSS AMOUNTS DUE
Diane Anthony	Unknown	4-28-80	6-16-80	1	106.27
Cecilia Bosinger	Unknown	12-8-80	1-19-81	1	116.67
Dorothy Cadotte	Unknown	4-7-80	4-28-80	1	185.53
Aileen Beard Crouce	(Formerly) Lakeview Motel, Jackson, Tn	1-1-80	2-16-81	1	762.31
Faye Davis	Unknown	1-1-80	6-16-80	1	396.97
Bill Ervin	Hwy 45 South, Jackson, Tn Apt #23, Lakeview Motel,	4-7-80	8-4-80	1	549.07
Linda Fullington	Hwy #45 South, Jackson, Tn Apt #21, Lakeview Motel	5-26-80	7-20-81	1	885.35
Stacy Fullington	Hwy #45 South, Jackson, Tn Apt #10, Lakeview Motel	4-7-80	7-20-81	1	938.90
Ruby Graham	173 Hurt St, Jackson, Tn	1-5-80	1-26-80	1	48.70
Margaret Hawley	135 Hollywood Dr, " "	11-3-80	7-20-81	1	1164.16
Mary L. Hinson	Unknown	6-29-80	4-12-81	1	726.31
Jerry Hinton	Hwy #45 South, Jackson, Tn Apt #15, Lakeview Motel	6-21-81	7-20-81	1	139.23
Patricia Humphries	Unknown	1-5-80	3-8-80	1	147.89
Elver Johanson	Unknown	2-23-81	3-23-81	1	78.20
Dorothy Johnson	Hwy #45 South, Jackson, Tn Apt #9, Lakeview Motel	2-16-81	5-11-81	1	169.83
Rowe Johnson	Unknown	9-1-80	3-16-81	1	681.76
Bessie Jones	Hwy #45 South, Jackson, Tn Apt #37, Lakeview Motel	4-7-80	12-29-80	1	2687.05
Willie Lewis	Unknown	11-3-80	12-15-80	1	303.07
Ruby Mae Mays	(Formerly) Lakeview Motel, Jackson, Tn	4-7-80	11-10-80	1	898.88
Darla Miller	Unknown	7-20-80	8-25-80	1	76.16
			TOTAL		Forward

Name and address of establishment

Buford's Lakeview Motel & Restaurant
1311 South Highland Ave
Jackson, Tn 38301

*Column 4-Code
FLSA 1
ICA 2
SCA 3
EPPA 4
CWHSSA 5
ARRA 6
CCPA 7

Appendix A

See Reverse Side for Instructions

Form WH-56
(Rev. June 1978)

EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 610 - 1720 West End Building
Nashville, Tn 37203

SIGNATURE OF CHIEF
Zedric H. McMillion

DATE
8-3-81

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (5) MAILED TO OFFICE DESIGNATED BY

Page 2

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See end. below)*	5. GROSS AMOUNTS DUE
Ruth H. Hoye	Highway #45 South, Jackson, Tn Apt #12, American Motor Inn	8-11-80	3-23-81	1	886.00
Juanita Bullinika	95 Holly St, Bemis, Tn	1-1-80	7-20-81	1	1084.02
Patricia Neal	Unknown	12-1-80	1-3-81	1	93.87
Jeannine Nolan	Unknown	1-11-81	2-9-81	1	75.69
Vickie Perona	Unknown	2-23-81	6-15-81	1	305.65
Darlene Preculey	Unknown	4-7-80	7-13-81	1	572.33
Joe Presbyter	Unknown	4-21-80	3-9-81	1	418.93
Shirley Raley	Unknown	5-5-80	10-13-80	1	74.41
Mike Stebbins	Highway #45 South, Jackson, Tn Apt #16, Lakeview Motel	7-12-81	7-20-81	1	59.04
Diane Wade	Unknown	1-1-80	11-3-80	1	307.30
Joe Weir	(Formerly) Hurt Street Lakeview Motel, Jackson, Tn	7-28-80	2-23-81	1	577.60
Betty Whitaker	Hwy #45 South, Jackson, Tn Apt #29, Lakeview Motel	8-25-80	11-17-80	1	168.09
Marty Whitaker	Unknown	1-5-81	5-25-81	1	913.50
Donna Wilson	Hwy #45 South, Jackson, Tn Apt #18, Lakeview Motel	4-20-81	7-20-81	1	126.66
Mary Sue Wray	Unknown	4-26-80	6-16-80	1	138.15

TOTAL $16,863.55

Name and address of establishment

Buford's Lakeview Motel & Restaurant
1311 South Highland Ave
Jackson, Tn 38301

*Column 4 Code
FLSA 1
EPA 2
SCA 3
CWHSA 4
CA/HSSA 5
AEPA 6
CCPA 7

See Reverse Side for Instructions

Form WH56
Effective June 1978

U.S. [illegible] OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 610 - 1720 West End Bldg
Nashville, Tn 37203

COMPLIANCE OFFICER: Zedric N. McMillen — DATE: 8-5-81

SUMMARY OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY

Page 1

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See codes below)*	5. GROSS AMOUNTS DUE
Jimmy Arnold	131 Lenoir St, Jackson, Tn	4-12-80	3-2-81	1	2687.42
Judy Benson	Unknown	2-9-81	3-2-81	1	365.31
Rick Benson	Unknown	2-9-81	3-2-81	1	354.35
Jonor Bray	707 East Lafayette St, Jackson, Tn	1-5-80	7-18-81	1	2091.00
Lonnie Carroll	Rt #1, Box 771, Denmark, Tn	1-5-00	3-23-01	1	8039.34
Susan Darlene Crews	Unknown	1-5-80	1-12-00	1	140.22
Gilbert Davis	575 South Royal St, Jackson, Tn	3-15-80	9-29-80	1	1005.42
John T. Dennis	65 Carrol Ann Drive, ""	4-20-81	6-15-81	1	817.39
Dell Ehrett	Unknown	1-5-00	3-22-00	1	1400.72
Bill Ervin	Hwy #45 South, Jackson, Tn Apt #23, Lakeview Motel	1-5-80	7-18-81	1	2726.41
Frances Ervin	Jackson, Tn Room 103, Downtowner Motel	1-5-00	7-18-81	1	3729.11
Ruby Graham	173 Hurt St, Jackson, Tn	4-26-81	7-18-81	1	658.29
Judy Heilman	Unknown	9-28-80	12-22-00	1	850.72
Mary Hinson	Unknown	6-15-81	6-30-81	1	108.48
Joe Holland	Unknown	11-3-00	12-15-00	1	747.16
Telford E. Hunt	Unknown	4-26-80	6-28-00	1	1167.27
Doris Johnson	Unknown	11-3-80	11-25-80	1	232.47
Marlene Keith	Unknown	3-15-80	6-28-00	1	1121.74
J. D. Koon	Unknown	1-5-81	1-26-81	1	310.69
Willie Lewis	Unknown	9-15-00	2-16-01	1	1364.99

TOTAL Forward

Name and address of establishment

Joe's Cafe
100 North Highland Ave
Jackson, Tn 38301

*Column 4 Code
FLSA 1
ISCA 2
SCA 3
DBRA 4
CWHSSA 5
ARRA 6
CCPA 7

See Reverse Side for Instructions

Form WH-56
(Rev. June 1978)

EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 610 - 1720 West End Bldg
Nashville, Tn 37203

COMPLIANCE OFFICER: Zodric N. McMillen — DATE: 8-5-81

SUPERVISION OF UNPAID WAGES

PAYMENT TO BE COMPLETED AND ORIGINAL COPY OF RECEIPT (S) MAILED TO OFFICE DESIGNATED BY _____

Page 2

1. NAME	2. ADDRESS	3. PERIOD COVERED by Workweek Ending Dates		4. ACTS (See code below)*	5. GROSS AMOUNTS DUE
Kathy Martin	Unknown	1-26-80	3-8-80	1	490.77
Carvey McCroskey	Jackson, Tn Rt #1, New Bells Hwy,	1-1-80	7-18-81	1	3087.60
Sara Renee McKee	Unknown	4-5-81	5-25-81	1	50.79
Bernice Minton	Hwy #45 South, Jackson, Tn Apt #21, Lakeview Motel	6-8-81	7-10-81	1	344.15
Danny Mosier	Unknown	1-5-80	3-8-80	1	1167.27
Ruth M. Moyo	Jackson, Tn Apt #12, American Motor Inn	4-5-81	7-10-81	1	1293.34
Leslie Owens	Unknown	7-12-81	7-18-81	1	59.04
Clara Page	Unknown	3-15-80	8-30-80	1	1752.75
Harold Page	Unknown	1-20-80	3-5-80	1	576.87
Fred E. Parrish	Briaroliff Drive, Jackson, Tn	7-5-80	10-27-80	1	741.69
Joe Prysbyns	Unknown	1-5-80	4-12-81	1	2399.64
Shirley Raley	Unknown	3-15-80	4-19-80	1	420.66
Ted Russell	Jackson, Tn c/o Murphy Hotel, South Royal	1-5-80	10-27-80	1	3710.69
Barbara Rutledge	Unknown	3-16-81	3-20-81	1	373.40
Clifford Smith	Jackson, Tn Apt #601, New Southern Center	1-19-80	10-27-80	1	2641.79
Sadie Smith	Unknown	7-5-80	12-15-80	1	992.61
Anita Taylor	Unknown	12-1-80	12-15-80	1	112.91
Vada Louise Touton	Unknown	10-20-80	11-17-80	1	290.50
Mike Vales	Hwy #45 South, Jackson, Tn Apt #47, Lakeview Motel	9-1-80	7-18-81	1	3396.52
Jessie Warren	Union City, Tn	1-5-80	6-1-81	1	3190.62
Joe Weir	Hurt Street, Jackson, Tn	1-5-80	5-25-81	1	2675.49
Billy Williams	Unknown	2-9-81	3-8-81	1	306.76
			TOTAL		859,984.36

Name and address of establishment

Joe's Cafe
108 North Highland Ave
Jackson, Tn 38301

*Column 4 Code
FLSA 1
PCA 2
SCA 3
DBRA 4
CWHSSA 5
ACHA 6
CCPA 7

See Reverse Side for Instructions

Form WH-56
(Rev. June 1976)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5644

Secretary of Labor, et al.,
Plaintiffs-Appellees,

vs.

Fritz B. Mayfield, d/b/a Joe's Cafe and
Buford's Lakeview Motel and Restaurant,
Defendants-Appellants.

ORDER
(Filed February 29, 1984)

BEFORE: LIVELY, Chief Circuit Judge, JONES, Circuit Judge and PECK, Senior Circuit Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and

It is therefore ORDERED that said judgment be and it hereby is affirmed.

Entered By Order Of The Court

/s/ John P. Hehman, Clerk

ISSUED AS MANDATE: March 22, 1984
COSTS: NONE

APPENDIX D

PARTIAL TRANSCRIPT
Show Cause Hearing, August 27, 1982
United States District Court for the Western District of Tennessee, The Honorable Robert M. McRae, Judge

FOR APPELLEE, DONOVAN:

Mr. George Drumming
U.S. Department of Labor
Office of the Solicitor
280 U.S. Courthouse
801 Broadway
Nashville, TN 37203

FOR APPELLANT, MAYFIELD:

Mr. James T. Sanderson
106-108 West Market Street
P.O. Box 331
Bolivar, TN 38008

[4] THE COURT: All right, I have two matters set, and I would like to take up the case of Donovan versus Mayfield first.

Is everybody here on that?

MR. DRUMMING: We are ready, Your Honor.

MR. SANDERSON: Yes, Sir.

THE COURT: The only thing we have really is a Motion for Default Judgment, and the Court features that its job is to see whether default judgment is appropriate.

MR. SANDERSON: Your Honor please, I represent Mr. Mayfield, the Defendant in that case.

Since Mr. Mayfield contacted me, and I have never handled one of these type of cases involving the division of wage and

hour and I immediately called Mr. Drumming in Nashville and informed him of that fact, and told him I had been contacted by Mr. Mayfield, and that I would attempt, within the time allowed me, to represent his interest, and familiarize myself with the Act, and make the appropriate answer to the pleadings.

And in the course of that we have been trying to gather all of the bookkeeping data that Mr. Mayfield had available to him, both here in Jackson, Tennessee and with his accountants in **[5]** Chicago, if Your Honor please.

Mr. Mayfield is the owner of a place here in Jackson called Joe's Cafe on Highland Street, and also the Lakeview Restaurant on Highway 45 South, if Your Honor please.

THE COURT: Why did you get into the matter so late, Mr. Sanderson?

MR. SANDERSON: Well I'm not sure that I got in so late, Your Honor.

I, quite frankly, have not been able to get myself in a position to appropriately reply and respond to the rather insistent position that Mr. Drumming has been taking with me in this matter.

THE COURT: Now, wait a minute.

The complaint was filed on March 26, 1982.

The application for default was filed on June 22, 1982.

And you filed a response to the application for default, but didn't say anything about excusable neglect, on June 24. And today when we opened court at the time it was set you were not in the courtroom because you were filing a Motion to Set Aside the Default.

Now, this Court has a hard time scheduling matters in this district. We have scheduled this **[6]** morning two things where people apparently don't think the Rules mean what they say. And, furthermore, the Motion to Set Aside the Default comes in at the last minute.

MR. SANDERSON: I appreciate that, Your Honor.

THE COURT: I'm just not going to grant it. It is not timely filed. I have scheduled this thing, and I have scheduled for my presence here, and I'm sorry, but it just comes too late.

I want to have a hearing on what the proper default judgment is.

MR. SANDERSON: May I call attention to the response to the application for entry of default which I filed on June 24, 1982, and Your Honor said that there was no mention of excusable neglect, and that's exactly what I attempted to convey to the Court by filing that response, and I have tried to set forth as best I could—

THE COURT: Well, the Rules very clearly tell you how you have to do it.

It was an unsworn affidavit, and it did not meet the issues; it did not put opposing counsel — obviously you did it just the same way you are doing today, and I'm sorry, but I'm just not going to do it. This man comes too late.
[7] Now, if we grant this they ought to at least have the courtesy to be prepared for your motion, so that means we would have continue it I guess for a half a year and we could try the case quicker than we could put up with all of this namby-pamby.

MR. SANDERSON: Well —

THE COURT: I overrule the Motion to Set Aside the Entry of Default that was filed this morning because it comes too late.

Now, would you put on your proof about what you want for a default judgment, sir?

MR. SANDERSON: Note our exception, if Your Honor please.

THE COURT: You don't have to note your exception. You note my exception, please.

Now, would you go forward and explain what you have in support of your default judgment?

MR. DRUMMING: Your Honor, I have with me this morning Mr. Zeb McMillan who is the former Compliance Officer who conducted the investigation and which computed the back wages due.

I have no other witnesses, I'm not prepared to put on a full case, a full showing of proof.

I can, however, put on testimony of Mr. **[8]** McMillan.

THE COURT: All right, well, you tendered on July 28th a default judgment, a proposed default judgment, didn't you?

MR. DRUMMING: Yes, sir.

THE COURT: Doesn't it have attachments to it which explain what you want?

MR. DRUMMING: Yes, Your Honor.

THE COURT: Well, put him on and let's let him identify it, and then if Mr. Sanderson has any questions about it he can ask them.

But I am not going to — you know, when people neglect answering they are not entitled to try the case in this sort of thing.

MR. SANDERSON: If Your Honor please —

THE COURT: Please swear the man in, Ginny.

No. 83-2090

(2)

FILED
AUG 10 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRITZ BUFORD MAYFIELD, ETC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

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QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion to set aside entry of default under Fed. R. Civ. P. 55(c) and in granting the Secretary's motion for default judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2090

FRITZ BUFORD MAYFIELD, ETC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A19) is reported at 729 F.2d 1462 (Table). The district court's findings of fact and conclusions of law (Pet. App. A1-A11) and default judgment (Pet. App. A12-A18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. The petition for a writ of certiorari was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owned and operated Joe's Cafe and Buford's Lakeview Motel and Restaurant in Jackson, Tennessee (Pet. App. A2). A compliance investigation conducted by the Secretary of Labor in 1981 revealed that petitioner did not pay his employees the minimum wage for all hours

worked or overtime compensation for workweeks of longer than 40 hours, and did not maintain proper records, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. 206, 207, 211(c), 215(a)(2) and (5) (Pet. App. A2-A5). Specifically, the investigation showed that petitioner had underpaid 77 employees a total of $62,426.43 between July 19, 1979 and July 18, 1981 (*id.* at A3).[1]

On March 26, 1982, the Secretary filed this action in the United States District Court for the Western District of Tennessee, seeking to enjoin petitioner from withholding back wages due employees and from committing future violations of the Act. Although petitioner was served with the complaint on March 30, 1982, he failed to answer, plead or make any other response within the time permitted by law (Pet. App. A12).

2. After almost three months had elapsed, the Secretary, on June 22, 1982, filed with the clerk of the district court, pursuant to Fed. R. Civ. P. 55(a), an application for entry of default together with a supporting sworn affidavit. The Secretary asserted that, in view of petitioner's failure to respond to the complaint within the required time, the employer should be held in default. C.A. App. 7-9. The clerk entered default on June 22, 1982 (C.A. App. 14).

On June 24, 1982, petitioner filed a "response to application for entry of default," accompanied by an affidavit from his counsel (C.A. App. 15-17). The response stated briefly that petitioner was then "without sufficient knowledge or

---

[1]A prior compliance investigation conducted in 1977 also had revealed violations by petitioner of the minimum wage, overtime compensation and record-keeping provisions of the Act. In particular, several employees were found to be due more than $5,000 in back wages. The compliance officer who conducted the investigation in 1977 explained the requirements for further compliance with the Act. Petitioner had reimbursed his employees the full amount computed to be due at that point. Pet. App. A2.

information to form a belief as to the averments contained in Plaintiff's complaint." The affidavit in support of the response reiterated the claim that petitioner was without sufficient information to answer the complaint and further stated that "within a reasonable amount of time the defendant will file an answer fully and accurately defending said complaint." The Secretary filed a counter-response in support of his application for entry of default (*id.* at 18-20).

3. On July 26, 1982, the Secretary filed a motion for judgment by default, attaching supporting affidavits and an exhibit that included payroll records and back wage computations. On August 13, 1982, the district court set August 27, 1982, as the date for a hearing at which petitioner was to show cause why a default judgment should not be entered against him. On the day of the scheduled hearing, petitioner filed a motion to set aside the entry of default and moved the court for permission to enter a defense to the Secretary's complaint on the ground that petitioner did not meet the jurisdictional minimum of annual gross volume of sales of $325,000 (C.A. App. 26-43).

At the show cause hearing, a Department of Labor compliance officer testified to the method by which he calculated back wages, and further testified that the calculations were based upon examinations of available employee records, interviews of available former and current employees, and interviews of petitioner (C.A. App. 55, 62, 68-74). The compliance officer also testified concerning the Act's coverage, stating that the annual gross volume of sales for the enterprise was determined by using monthly totals of business done by each of petitioner's establishments (*id.* at 62). The totals, furnished by petitioner's accountants, were taken from petitioner's Tennessee sales tax returns (*id.* at 62, 66-67).

Both at the outset and at the conclusion of the evidentiary hearing, the district court denied petitioner's motion to set aside the entry of default, holding that the June 24, 1982, motion was insufficient because it said nothing about excusable neglect and that the August 27, 1982, motion was inadequate because it came too late (Pet. App. A21-A22). At the close of the hearing, the court announced that, in any event, it had read petitioner's second motion and had found it insufficient to show excusable neglect (C.A. App. 79). The court concluded (*id.* at 80):

> Well, I'm prepared to say, that the hearing has convinced me that the Motion would not have been well taken anyway, but I will stand by my ruling that it was not timely filed.

On September 24, 1982, the district court entered findings of fact and conclusions of law (Pet. App. A1-A11) in which it reiterated (*id.* at A3; see also *id.* at A7) that petitioner's "Motion to Set Aside the Entry of Default filed on the date of hearing * * * was untimely and failed to show any excusable neglect for failure to answer, plead or respond within the required time." The court further found that petitioner had violated the minimum wage, overtime and recordkeeping provisions of the Act. On October 14, 1982, the court entered a default judgment against petitioner and enjoined him from committing further violations of the Act and from withholding back wages in the amount of $76,847.91, plus 12% interest (*id.* at A7, A12-A14).

4. The court of appeals affirmed, finding that "no prejudicial error intervened in the judgment and proceedings in the district court" (Pet. App. A19).

ARGUMENT

The court of appeals' decision is correct and represents nothing more than the application of settled principles to the facts of this case. Moreover, the decision below does not

conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioner contends (Pet. 8-12) that the district court should have set aside the entry of default for good cause shown pursuant to Fed. R. Civ. P. 55(c) or, alternatively, that the court should have set aside the default judgment in accordance with Fed. R. Civ. P. 60(b). It is well established, however, that the grant or denial of a motion for entry of default or for judgment by default is a matter that lies within the sound discretion of the district court. See, *e.g.*, *Marziliano* v. *Heckler*, 728 F.2d 151, 156 (2d Cir. 1984); *Gomes* v. *Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970); *Consolidated Masonry & Fireproofing, Inc.* v. *Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967); *Hughes* v. *Holland*, 320 F.2d 781, 782 n.2 (D.C. Cir. 1963); *Smith* v. *Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957). When a district court denies relief from a default, there is no abuse of discretion unless it is evident that the court "was clearly wrong in finding that good cause had not been shown for setting aside the default." *Consolidated Masonry*, 383 F.2d at 251. See also *Marziliano*, 728 F.2d at 156. To be sure, in exercising its discretion, a court must keep in mind the preference that cases be decided on the merits, rather than by default. *Gomes*, 420 F.2d at 1366. Nevertheless, that preference must be weighed against "considerations of social goals, justice and expediency." *Ibid.* (footnote omitted). Accordingly, it is incumbent upon the defaulting party to show that there was "good reason for the default and that he has a meritorious defense to the action." *Ibid.*

As petitioner notes (Pet. 8-9), the courts consider several factors in determining whether there exists good cause for setting aside an entry of default:

> (1) [w]hether the party in default has shown a meritorious defense;
>
> (2) [h]ow promptly the defaulting party acted;

(3) whether the default was willful or the result of excusable neglect; and

(4) whether the non-defaulting party will be prejudiced by the setting aside of the default.

Application of these factors to the present case demonstrates that the district court acted well within its discretion in denying petitioner's motion to set aside the entry of default.[2]

a. First, with respect to petitioner's promptness and the wilfulness vel non of his default, as we noted above, nearly three months elapsed between the time the Secretary filed and served his complaint and his application for entry of default.

Moreover, petitioner failed to submit a timely motion to set aside the entry of default. Although there is no precise definition of what constitutes a reasonable time period in which to respond to an entry of default, a defaulting party is expected to act "with reasonable promptness" in seeking to set aside an entry of default or a default judgment. See *Consolidated Masonry*, 383 F.2d at 251 (two and a half month delay between entry of default and defaulting party's motion to set aside default held unreasonable). See also *Marziliano*, 728 F.2d at 154, 156 (presentation of defaulting party made within nine days of learning of default rejected by court); *Hughes* v. *Holland*, *supra* (motion to set aside

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[2]The criteria for setting aside a default judgment by a Rule 60(b) motion are at least as stringent as those governing a Rule 55(c) motion to set aside entry of default. See *United States* v. *$55,518.05 in United States Currency*, 728 F.2d 192, 195 (3d Cir. 1984); *United Coin Meter Co.* v. *Seaboard C. R.R.*, 705 F.2d 839, 845 (6th Cir. 1983). As petitioner acknowledges (Pet. 9), some courts apply an even stricter standard to Rule 60(b) motions. See *Jackson* v. *Beech*, 636 F.2d 831, 835-836 (D.C. Cir. 1980). Since petitioner cannot show that he met the Rule 55(c) test, he surely cannot satisfy the Rule 60(b) standard.

default and for permission to file a defense presented less than two months after entry of default denied).

Here, petitioner's initial response to the entry of default indicated only that he intended to file an answer. Petitioner did not actually submit an answer to the Secretary's complaint, or move with supporting materials to set aside the entry of default, until the day of the evidentiary hearing on the Secretary's motion for default judgment — more than a month after the entry of default, and four months after the complaint had been filed. In these circumstances, the district court correctly concluded (Pet. App. A7) that petitioner had "failed to timely respond to the entry of default" and that his "lack of diligence," together with his failure to provide an adequate excuse for his neglect, indicated that there was no "good cause" to relieve him from the entry of default.

b. Furthermore, as the district court noted (Pet. App. A22), setting aside the default in this case could have substantially prejudiced the Secretary. A "critical" concern in this context is that the factual allegations supporting the alleged "meritorious defense" be "presented in a timely enough fashion to permit the opposing party to question the legal sufficiency of the defense." *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978). Petitioner's defense, presented moments before the show cause hearing convened, permitted the Secretary no notice of the facts or issues relied upon by petitioner (Pet. App. A22). Thus, as the district court remarked (*ibid.*), full consideration of petitioner's motion and accompanying documents would have required a continuance of half a year in order to allow time for the Secretary to prepare his response and for the court to re-calendar the case.

In addition, setting aside the entry of default and permitting the case to go to trial could have thwarted the Secretary's ability to locate witnesses and present his case.

This is particularly true in a situation like this one, which involves allegations of record-keeping violations.[3] As of the date of the show cause hearing, the addresses of 44 of petitioner's employees already were unknown (see Pet. App. A15-A18). Had the case been delayed another six months, additional employee witnesses whose testimony could have been crucial to the Secretary's case might no longer have been available to testify. The potential for loss of evidence constitutes substantial prejudice to the Secretary. See C. Wright, A. Miller & M. Kane, 10 *Fed. Practice & Procedure* § 2699 (2d ed. 1983).

c. Petitioner's further contention (Pet. 11) that the judgment below should be reversed solely because the district court "refused to consider" his "meritorious defense" also is unavailing. As discussed above (pages 6-7, *supra*), the district court, in its discretion, was not required to entertain an eleventh-hour motion to set aside a default when full consideration of the motion would have necessitated a delay of six months and the defaulting party had failed to present any defense for a period of four months, even in response to the entry of default. Were the district court forced to adjudicate such a motion before entering a judgment of default, litigants could delay judgment almost indefinitely.

Moreover, the district court was in the best position to judge the good faith and credibility of the parties and to evaluate the possibility that petitioner had a meritorious defense in light of all the facts. *Marziliano*, 728 F.2d at 156. Petitioner asserted in his motion to set aside entry of default that he did not meet the annual sales volume test for enterprise coverage set forth in 29 U.S.C. 203(s)(2), and the court

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[3]See Report by the Comptroller General of the United States, *Changes Needed to Deter Violations of Fair Labor Standards Act* 12 (May 1981) (detailing prejudice resulting from delay in FLSA cases).

noted at the close of the show cause hearing that it had read petitioner's motion and affidavit (C.A. App. 79-80). In considering this defense, the district court had the benefit of the Secretary's evidence that petitioner in fact met the coverage test. At the show cause hearing, the Department of Labor compliance officer testified as to the manner in which coverage had been determined, stating that the annual gross volume of sales for the enterprise was determined by using monthly totals of business receipts at each of petitioner's establishments (*id.* at 62). The totals, furnished by petitioner's accountants, were taken from petitioner's own state sales tax returns (*id.* at 62, 66-67). Based on this evidence, the district court was entitled to conclude, especially in view of the prior violations committed by petitioner (see note 1, *supra*), that justice did not require setting aside the default in order to enable petitioner belatedly to develop a defense of non-coverage.

2. Petitioner also contends (Pet. 10) that the default should be set aside because the record below does not "show any consideration" of the factors he identifies as determinative. The district court need not explicitly mention the enumerated factors, however. It is sufficient to be able to infer from the record that the court found that the appropriate criteria were met. See, *e.g.*, *Marziliano*, 728 F.2d at 156.[4]

---

[4]In *Keegel* v. *Key West & Caribbean Trading Co.*, 627 F.2d 372 (D.C. Cir. 1980), the case on which petitioner relies (Pet. 10), the court of appeals did not reverse the judgment below on the ground of inadequate findings, explicitly stating (627 F.2d at 374) that it "need not * * * decide this case on that limited basis."

The Third Circuit has at times required the district court to make specific findings as to the factors of prejudice, meritorious defense, and bad faith. See *United States* v. *$55,518.05 in United States Currency*, 728 F.2d 192, 200 (1984) (Garth, J., dissenting), and cases cited therein. Even the Third Circuit, however, does not apply this requirement

In any event, when the district court's findings and comments are viewed as a whole, it is evident that the court in fact considered each of the criteria petitioner has identified. Thus, while at the outset of the show cause hearing the court rejected petitioner's motion to set aside default as untimely and prejudicial to the Secretary (Pet. App. A22), at the close of the hearing the court remarked that it had read petitioner's affidavit and found it "insufficient to show excusable neglect" (C.A. App. 79). Furthermore, as noted above (pages 8-9, *supra*), after receiving evidence relevant to the Act's coverage of petitioner, the court stated (C.A. App. 80) that "the hearing has convinced me that the Motion would not have been well taken anyway * * *." Hence, while the district court may not have addressed each factor expressly, it is clear that it considered each of the relevant criteria. In these circumstances, the court's refusal to set aside the default cannot be deemed an abuse of discretion.

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automatically to reverse a district court's discretionary denial of a motion to set aside default. See *United States* v. *$55,518.05 in United States Currency*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

SANDRA D. LORD
Attorney
Department of Labor

AUGUST 1984

DOJ-1984-08